91-772

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY PRINSKI,
Petitioner,

v.

TERMAR NAVIGATION CO., INC. and
VAN OMMEREN SHIPPING B.V.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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41

QUESTION PRESENTED

1. In a suit for damages by a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, does the shipowner's duty of care extend to unsafe conditions existing on cargo which is being used as a walkway for access to and from the cargo on which the longshoreman is working?

TABLE OF CONTENTS

	Page
Question Presented.	i
Table of Contents	ii
Index to Appendix	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Legislative History Involved	3
Statement of the Case	3
Reasons Why The Writ Should Be Granted	8
1. The decision below, which is based on the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), is in conflict with the decisions of the Court of Appeals for the Fifth Circuit, in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), and the decision of the Court of Appeals for the Ninth Circuit in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, *cert. denied*, 459 U.S. 967 (1982), all of which hold that the shipowner's duty of care extends to unsafe conditions existing in a cargo stow.	8
Conclusion	13

INDEX TO APPENDIX

Opinion of the United States District Court for the Eastern District of Pennsylvania 1a

Order of the United States District Court for the Eastern District of Pennsylvania dated February 25, 1991. . 6a

Order Amending Opinion of the United States District Court for the Eastern District of Pennsylvania . . . 7a

Judgment Order of the United States Court of Appeals for the Third Circuit dated August 12, 1991, affirming Judgment of District Court 9a

Stipulation 13a

Legislative History of Section 5(b) of the Longshore and Harbor Workers' Compensation Act 16a

TABLE OF AUTHORITIES

	Page
Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3rd Cir. 1987)	7, 9, 10, 11, 12, 13
Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984)	8, 12
Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981)	8, 12
Scindia Steam Navigation Co. v. De los Santos, 451 US 156, 68 L Ed 2d 1 (1981).	9
Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981).	8, 12
Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990)	8, 12
Legislative History of Section 5(b) of the Longshore and Harbor Workers' Compensation Act	8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Gary Prinski, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered August 12, 1991, affirming the granting of Summary Judgment in favor of respondents in the within proceeding, and in support thereof represents as follows:

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court for the Eastern District of Pennsylvania is not yet officially reported, and is reproduced in the appendix hereto at page 9a.

The Opinion of the United States District Court for the Eastern District of Pennsylvania is not yet officially reported, and is reproduced in the appendix hereto at page 1a.

The Order Amending Opinion of the United States District Court for the Eastern District of Pennsylvania is not yet officially reported, and is reproduced in the appendix hereto at page 7a.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on August 12, 1991 (9a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in

providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies avail able under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 92-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at page 4698. The portion relating to the elimination of the unseaworthiness remedy begins a page 4701 and is reproduced in the appendix hereto beginning at page 16a.

STATEMENT OF THE CASE

This is an action to recover damages for personal injuries suffered by petitioner, Gary Prinski, while working as a longshoreman. To facilitate the resolution of the legal issues presented by the case, the parties entered into a Stipulation (11a) which, for purposes of a Motion for Summary Judgment, sets forth the facts which the parties agreed there would be evidence to support. On the basis on this Stipulation, the respondents filed a Motion for Summary Judgment which was granted by the District Court (1a, 6a) and subsequently affirmed by Judgment Order by the Court of Appeals for Third Circuit (9a). The instant petition seeks review of the Third Circuit's affirmance of the decision of the District Court.

For purposes of the Motion for Summary Judgment, the Stipulation established the following facts.

On January 15, 1988, petitioner was employed as a longshoreman by Holt Cargo Systems, Inc. (hereafter "Holt"), a stevedore with terminal facilities located in Gloucester, New Jersey. On that day, Holt had been hired to discharge a cargo of steel products from the M/V SERAFIN TOPIC, a cargo ship which, at the time, was owned by respondent, Termar Navigation Co., Inc., and under time charter to respondent, Van Ommeren Shipping B.V. (11a).

Petitioner was injured when, while walking across pipe that was stowed in the No. 2 hold of the ship, he slipped and fell on ice that had formed on the pipe (13a-14a). The circumstances leading to the accident to petitioner were as follows.

Petitioner was working in a longshoreman gang which was assigned to discharge a cargo of steel products which was located in the No. 2 hold of the ship (11a). The cargo of steel products had been loaded aboard the ship at two ports in the Netherlands in December of 1987 (11a-12a). Following the loading of the cargo, the ship sailed for the United States where its first port for discharging cargo was Bridgeport, Connecticut. At Bridgeport, some cargo was discharged from the No. 2 hold of the ship (as well as from other holds) on January 12 and 13 of 1988. The vessel then sailed for Gloucester, New Jersey, arriving at Holt shortly before midnight on January 14, 1988. Cargo operations at Holt began at 8:00 A.M. on the morning of January 15, 1988 (12a).

At the time of the vessel's arrival at Holt, the *forward* half of the No. 2 hold was stowed with steel coils which were to be discharged at Holt. The *after* half of the No. 2 hold was stowed with structural steel beams which were to be discharged at Wilmington, North Carolina, the vessel's

next port. In addition, on top of these structural steel beams in the *after* end of the hold, there were two layers of steel pipe which also were to be discharged at Holt. This pipe was stowed in a fore and aft direction with single and double pieces of approximately 1 inch thick dunnage board placed between each tier of pipe. Also of relevance is that, at the time the steel had been loaded in the hold of the ship in the Netherlands, and prior to the vessel's arrival in Bridgeport, there had been a considerable amount of other cargo stowed on top of the pipe that was in the after end of the No. 2 hold. However, this cargo had been discharged at Bridgeport, and, as a result, the pipe then became the top of the stow at the after end of the hold (12a-13a).

In discharging the cargo in the No. 2 hold, the longshoremen started with the steel coils that were located in the *forward* end of the No. 2 hold. Three longshoremen, including petitioner, worked in the hold in connection with this discharging operation. They entered the No. 2 hold by means of a permanent fixed ladder located at the *after* end of the hold, and then had to walk *across* the pipe that now formed the top of the stow at the after end of the hold until they reached the steel coils that were stowed in the forward end of the hold. In leaving the hold, they had to retrace their steps by walking across the pipe from the forward end of the hold to the ladder located at the after end of the hold. Thus, for this purpose, the pipe stowed in the after end of the hold became the walking surface or floor over which they had to walk in order to go to and from the cargo they were discharging.

Petitioner was injured shortly after 3:00 P.M. on January 15, 1988. At that time he was walking across the pipe that was in the after end of the hold in order to reach the ladder to exit the hold. As he was walking across the pipe towards the ladder, he slipped and fell on a strip of very thin ice which extended across the pipe. This strip of ice, which extended across 10 to 12 adjacent pipes, was approximately 1 inch wide. Petitioner testified at his deposition, and photographs subsequently demonstrated, that this

strip of ice was thin and could be seen if one were looking for it but would not be readily apparent to one walking across the pipe if one did not know to look for it (13a-14a).[1]

The presence of such a strip of ice on a cargo in the hold of a vessel was an unusual condition. The origin of its configuration -- the strip of ice was in a relatively neat straight line across a cargo of separate pieces of pipe -- was difficult to explain. The only explanation that could be offered with respect to the source of this strip of ice was the opinion of an expert retained by petitioner who suggested that it might have come about as a result of water being squeezed from a piece of wet dunnage that had been on top of the pipe prior to the discharge in Bridgeport of the cargo that was on top of the pipe. The weight of the cargo which had been stowed on top of the pipe would have been sufficient to squeeze any water or other moisture out of the piece of wood dunnage had it been wet, or had it been the type of wood that contained considerable moisture, and that after the water had been squeezed from the dunnage, it froze creating a strip of ice in a straight line across the pipe the approximate width of the dunnage board from which it had been squeezed (14a-15a). This opinion was supported by entries in the vessel's log book which disclosed that while temperatures which the vessel encountered during its Atlantic crossing until January 6, 1988, were above freezing, the air temperatures fell to below freezing through the time the vessel was at Bridgeport and during the coastwise trip from Bridgeport down to Holt and during the time the vessel was at Holt (12a). In any event, the parties have agreed that the opinion of petitioner's expert is the only plausible explana-

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1. The District Court, in its original opinion, initially described this strip of ice as being one inch "thick" (1a). This was not correct; rather, the strip was quite thin and barely visible. In this respect, it was not an open and obvious condition. This error was called to the Court's attention and the Court amended tits opinion to reflect that the strip of ice was one inch "wide" (7a)

tion for the presence of the strip of ice which caused petitioner's fall and, the parties also agreed that the strip of ice was present on the pipe at the time work began in the No. 2 hold at 8:00 A.M. on the morning of January 15, 1988 (14a-15a). Thus, the case presents a factual situation in which ice developed on stowed cargo which, at the time of the accident, was serving as a walking surface over which longshoremen had to walk in the performance of their duties.

In granting summary judgment, the District Court, relying on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 839 F.2d 490 (3rd Cir. 1987), *cert. den'd.*, 486 U.S. 1007 (1988), held that a shipowner had no duty to inspect for unsafe conditions existing on cargo (4a), and, in the absence of proof of actual knowledge of the condition, had no duty to warn of an unsafe condition which might be present on cargo (5a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. **The decision below, which is based on the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), is in conflict with the decisions of the Court of Appeals for the Fifth Circuit, in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), and the decision of the Court of Appeals for the Ninth Circuit in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, *cert. denied*, 459 U.S. 967 (1982), all of which hold that the shipowner's duty of care extends to unsafe conditions existing in a cargo stow.**

In the Legislative History accompanying the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, Congress set forth an example of the type of condition for which a shipowner would be liable. Significantly, that Legislative History refers to a slip and fall accident, similar to the accident in the instant case with the only difference being that the slippery substance in the hypothetical case set forth in the Legislative History is oil, rather than ice. The Legislative History states (20a):

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) *the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under*

> *the circumstances*. The vessel will not be chargeable with negligence of the stevedore or employees of the stevedore. (Emphasis supplied)

The second part of the foregoing example establishes the duty of a shipowner to correct unsafe conditions which would be discoverable by a reasonable inspection. Liability does not depend upon the shipowner having "actual" knowledge of the condition, but, rather, requires only that the condition exist for a sufficient period of time to have been "discovered" and "removed" by the vessel in the exercise of reasonable care.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court elaborated on the shipowner's duty of inspection by distinguishing between conditions which were in existence *prior* to the start of cargo operations, and those which came into existence *after* the start of cargo operations. This Court held that, as to conditions arising *after* the start of cargo operations, the shipowner was under no continuing duty of inspection to discover such conditions. However, the shipowner did have a duty to inspect and discover conditions existing *prior* to the start of cargo operations and, as to such conditions, would be "charged with knowledge of the condition", see 451 U.S. at 168, and would "be deemed to have been aware" of the condition, see 451 U.S. at 176.

It is thus clear, on the authority of the Legislative History and *Scindia*, that if the strip of ice which caused petitioner to slip and fall in the instant case had been on the deck or other walkway of the vessel, he clearly would have a viable claim of negligence against the vessel. In the instant case, however, the District Court relying on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), nonetheless held that the plaintiff could not recover because the slippery condition happened to be located on cargo (even though this cargo was, in fact, being used as a walkway). In so holding, the District Court recognized that

there was a significant factual distinction between the instant case and *Derr* in that the presence of the ice on the cargo in the instant case could not be attributed to negligence of either the loading or the discharging stevedores. Indeed, since the freezing temperatures which caused the formation of the ice did not occur until a few days prior to the accident, the unsafe condition did not exist, and, therefore, was not capable of being discovered, at the time the cargo was loaded. In this sense, the instant case is distinguishable from *Derr* in that *Derr* involved a claim of negligence in the faulty securing of cargo at the time the cargo was loaded -- a condition which could have been discovered and cured at the time the cargo was loaded.

Notwithstanding the obvious factual distinction between the instant case and *Derr*, the District Court, in granting Summary Judgment, gave an expanded interpretation to *Derr* by interpreting *Derr* as holding that the shipowner *never* had a duty to inspect the condition of cargo (4a) and, therefore, could not be held responsible for an unsafe condition existing on cargo even if the unsafe condition was *not* caused by faulty stowage of the cargo.

In adopting this expanded interpretation of *Derr*, the Court below relied on the contention, first made in *Derr*, that it would be unreasonable to require a shipowner to inspect cargo conditions at each port that the vessel loads or discharges cargo (4a). This contention is contrary to both maritime practice and common sense.

There is nothing unreasonable in requiring a shipowner to inspect the condition of cargo at intermediary ports where a vessel stops to discharge cargo, any more than it is unreasonable to expect that a shipowner will inspect the condition of a vessel's decks and gear and equipment at each intermediary port. If a shipowner has to inspect the condition of a vessel's decks to remove slippery conditions at each intermediary port at which the vessel stops, why should there be any difference with respect to the condition of cargo? Particularly, where, as here the condition involved is not

one which was created by a loading stevedore, but, rather, was one which developed during the course of the voyage, if injury to longshoremen is to be prevented, then the shipowner is the only one in a position to take the steps necessary to prevent or remove the condition. The 1972 Amendments to the Longshore and Harbor Workers Compensation Act, in relieving the shipowner from liability for unseaworthiness, did not also relieve the shipowner from liability for negligence. Negligence implies a duty of reasonable inspection. The fact that an inspection may have to be made more than once during the course of a voyage does not make it unreasonable.

The District Court in the instant case, again relying on *Derr* as authority, also held that the shipowner's duty of reasonable care extended only to the "work space" of the vessel and "work space" did not include "stowed cargo" (5a). This holding, however, overlooks the fact that at the time petitioner was injured, the pipe on which he was walking was not being discharged and was not directly involved in the cargo operations; rather, it was the walkway by which petitioner was gaining access to the cargo which he was discharging. From petitioner's standpoint, at the time of the accident, this cargo was as much a part of the work space of the vessel as was the deck of the vessel insofar as it was his means of gaining access to and from the cargo on which he was working. If that pipe had not been in the after end of the hold, then petitioner would have been walking across the deck of the vessel, and if that same strip of ice had been on the deck of the vessel, then it is clear that the shipowner's duty would have extended to discovering and removing it.

To distinguish between the shipowner's duty with respect to the condition of a deck over which longshoremen must walk to reach the area where they have to work and cargo over which they have to walk to reach that same area is both artificial and illogical. Is a shipowner to be permitted to escape its responsibility for providing a safe means of ingress and egress to the work area by placing cargo on top

of the normal means of ingress and egress and then have no responsibility for the condition of that cargo?

The problem in the instant case ultimately arises from the *Derr* decision, -- a decision which repeatedly has been recognized as being in conflict with decisions from other circuits.[2] Just how illogical and irrational are the decisions being made in the Third Circuit on the basis of the *Derr* decision becomes apparent when one considers the possibility that if, in the instant case, all, instead of just some, of the cargo that had been stowed in the after end of the hold had been discharged at Bridgeport prior to the vessel's arrival at Holt, and the strip of ice had formed on the deck of the 2 hold -- an event that was just as possible as the formation of the ice on the pipe that had not been discharged -- and petitioner slipped and fell on this ice, petitioner would be entitled to recover because the icy condition then would have been on what clearly was a work space of the vessel. The fact of the matter is that, in the realistic operation of vessels, and the manner in which cargo is stowed in vessels, cargo becomes part of the work space of the vessel. The *Derr* distinction between cargo and work space is the ultimate distinction without a difference.

Derr is in conflict with decisions from other Circuits.

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2. The panel of the Third Circuit which decided *Derr* recognized that its decision was in conflict with the Ninth Circuit's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, *cert. denied*, 459 U.S. 967 (1982), see 835 F.2d at 494, and the Fifth Circuit in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), subsequently recognized the *Derr* was in conflict with its decisions prior decisions in *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), see 873 F.22 at 848, and the existence of this conflict was cited by three Justice of this Court in dissenting from the denial of the Petition for a Writ Of Certiorari which was filed in *Woods*, see *Sammiline Company, Ltd. et al. v. John Woods, et ux., et al., 110 S.Ct. 853, 107 L. Ed. 2d 847 (1990) (Dissenting Opinion).*

The instant case -- being based on *Derr* -- is in conflict with decisions from other Circuits. The Third Circuit -- and the District Courts in the Third Circuit -- are giving an expanded interpretation to *Derr*, thereby accentuating the conflict between courts in the Third Circuit and other courts over the extent to which the shipowner's duty of care extends to the condition of stowed cargo. It is clear from the decision in the instant case that this conflict will persist and grow until it is resolved by this Court. For this reason, it is respectfully submitted that a writ of certiorari should issue to resolve the conflict in circuits as to the shipowner's duty of care with respect to the condition of stowed cargo.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Opinion and Judgment of the court below.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC. and VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

MEMORANDUM & ORDER

GAWTHROP, J.

Plaintiff, Gary Prinski, seeks recovery under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (b), for injuries he sustained while working aboard the M/V Serafin Topic, a cargo ship owned by defendant, Termar Navigation Company, Inc., and time chartered by defendant, Van Ommeren Shipping, B.V. The defendants have moved for summary judgment upon stipulated facts. For the reasons that follow I shall grant the motion.

BACKGROUND

Plaintiff, Gary Prinski, was injured on January 15, 1988, after slipping on a thin strip of ice, which had formed on top of a pile of black steel pipe stored in the # 2 hold of the cargo ship, M/V Serafin Topic. Mr. Prinski was in the hold as an employee of Holt Cargo Systems, a stevedore hired to unload cargo from the ship in the port of Camden. The ice strip was about one inch thick and was not readily visible at the time of the accident.

According to an expert hired by the plaintiff, the ice formed

from water that seeped from wet dunnage.[1] The ship, which was originally loaded in the Netherlands, stopped in Bridgeport, Connecticut, before berthing in Camden. The black pipe, upon which the ice formed, became exposed after beams and sheet piling, which had been stored above the black pipe, was unloaded in Bridgeport. The parties agree that the ice was formed by subfreezing air temperatures that existed before and during the ship's passage to New Jersey, and that the ice was present before cargo operations began in Camden. The parties also agree that the defendants had no actual knowledge of its existence.

The plaintiff argues that the defendants are liable for his injuries because they failed to inspect the cargo hold before Holt began offloading the cargo in Camden.[2] Plaintiff contends that had defendants properly inspected the cargo, they would have discovered the ice and the danger is presented, and they would have been required to remedy or warn about the condition. Defendants counter that they had no duty to inspect.

DISCUSSION

The question here is a narrow one. The Supreme Court has ruled that vessel owners have no duty to inspect or supervise stevedoring operations, and that they cannot be held liable for injuries to longshoremen resulting from dangerous conditions that develop during the loading or unloading of cargo. See Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156, 172 (1981). The Third Circuit has held this rule to apply even if the dangerous conditions were created by the negligence of the on-loading stevedore, and the injury sustained by an employee of the off-

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1. Wooden boards placed between the layers of cargo for protection and ventilation.

2. Although the accident occurred in New Jersey, plaintiff is a resident of Pennsylvania and both defendants are incorporated in Pennsylvania, making this forum a proper venue for the action, under 28 U.S.C. § 1391(b).

loading stevedore. See Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3rd Cir. 1987). The question here is whether an exception to this rule may be found where the dangerous condition cannot be attributed to negligence of either the on-loading or off-loading stevedore.[3] On the basis of Scindia and Derr, I have no trouble holding that it may not.

Scindia was decided after a substantial change in the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Before 1972, longshoremen injured at work could recover from a vessel owner on a theory of unseaworthiness simply by demonstrating that the injury was caused by an unsafe condition on the vessel. No proof of fault on the part of the shipowner was required. See Scindia 451 U.S. at 164-5. Amendments to the Act in 1972 abolished the unseaworthiness claim, leaving negligence as the only basis for shipowner liability. See 33 U.S.C. § 905(b). Against this statutory backdrop, the Supreme Court ruled that to hold the shipowner liable for dangerous conditions that develop during cargo operations--even on a theory of negligence--would require the shipowner to oversee the stevedore, a situation that would be inconsistent with the Congressional intent to eliminate liability without fault. See Scindia, 451 U.S. at 169. The Court thus stated that the shipowner "is entitled to rely on the stevedore" and is under "no duty to inspect or supervise cargo operations". 451 U.S. at 172 (Emphasis in original).

The Third Circuit expanded upon Scindia to hold that shipowners are also under no duty to inspect before stevedoring operations begin. See Derr, 835 F.2d at 494. In so doing, that court recognized that other circuits had ruled otherwise. See Derr, 835 F.2d at 494 (citing Stass v. American Commercial

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3. Defendants argue that this case falls directly under the Third Circuit's opinion in Derr because the accident can only be attributed to the on-loading stevedore's negligent use of soggy dunnage. Whether the on-loading stevedore was negligent would be a factual question for a jury. I decide the case on the assumption that the stevedore was not.

Lines, Inc., 720 F2d. 879, 882 (5th Cir. 1983); Clark v. Bothelho Shipping Corp., 784 F.2d 1563, 1565 (11th Cir. 1986). However, the Derr court agreed instead with the district court, which held that a duty upon the shipowner to inspect cargo conditions at each port would render the principle of fault-based liability a nullity. See Derr, 835 F.2d at 494 (citing Robertson v. Tokai Shosen K.K., 655 F.Supp. 152, 155 (E.D.Pa. 1987).

Plaintiff argues that Derr is distinguishable because it involved cases where foreign stevedores had been negligent in their loading of cargo. Here, plaintiff argues, the negligence of the foreign stevedore is not established. This is a distinction without a difference. The Derr holding was based on a determination of the duty of the shipowner. The court stated that the issue was not "where the cargo was loaded" but whether the vessel could be held liable for "failure to inspect or supervise [its] stowage". See 835 F.2d at 495. In answering in the negative, the Third Circuit held, in effect, that shipowners are never liable for conditions that occur as a result of cargo operations within the responsibility of the stevedores. See 835 F.2d at 497. Whether or not one of the stevedores involved in the stowing of cargo was at fault is immaterial to the scope of the shipowner's duty. Indeed, if shipowner liability were tied to a finding of negligence on the part of a stevedore, shipowners would always be under a duty to inspect and supervise at each port because they could never be certain that negligence would be found on the part of a stevedore. This is squarely contrary to Derr.

Plaintiff also argues that the defendants in this case may be held liable under an exception outlined in Scindia. While the Supreme Court held that vessel owners have no duty to inspect stevedoring operations, the court held that vessel owners owe a continuing duty of care with respect to the "ship's gear, equip-

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4. Derr was a consolidated appeal from Derr v. Kowaskaki Kisen K.K., No. 85-5250, ben op., App. at 106-109 (E.D.Pa. Dec. 2, 1986); and Robertson, 655 F.Supp. at 152.

ment, tools, and work space to be used in the stevedoring operations". See Scindia, 451 U.S. at 167. According to the Court, a shipowner who becomes aware of a defect in ship's "gear, equipment, tools or work space" during stevedoring operations, or who is aware or should be aware of the defect before stevedoring operations begin, owes a continuing duty of care to intervene to remedy the defect. See Scindia, 451 U.S. at 176, 178.

Plaintiff argues that the ice on the black steel piping in the # 2 hold of the M/V Serafin Topic was a dangerous condition in the ship's work space, of which the defendants should have known and for which they may be held liable. However, the Third Circuit in Derr held that the Supreme Court's reference to "work space" was not intended to include stowed cargo. See Derr, 835 F.2d at 495. To hold otherwise would reintroduce the duty to inspect cargo, a duty that is expressly rejected elsewhere in the Scindia opinion. See Derr, at 495-496.

The Derr opinion also suggests that there may be a duty to warn of improper stowage, Scindia notwithstanding, if the ship has actual knowledge of the danger and the danger is not open and obvious to the stevedore. See Derr, 835 F.2d at 496. Without deciding whether the ice hazard here was open and obvious, it is clear from the parties' stipulation that the defendants did not have actual knowledge of the danger.

There being no basis under the law upon which plaintiff may recover on its claim, defendants are entitled to judgment. See Fed.R.Civ.P. 56(c). An order follows.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC.	:	
and	:	
VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

ORDER

AND NOW, this 25th day of February, 1991, upon consideration of defendants' Motion for Summary Judgment, and plaintiff's Answer thereto, it is hereby ORDERED that the motion is GRANTED, and the complaint brought by plaintiff is DISMISSED with prejudice.

BY THE COURT,

/S/ Robert S. Gawthrop, III
Robert S. Gawthrop, III, J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC. and VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

ORDER AMENDING OPINION

GAWTHROP, J.

AND NOW, this 21st day of March, 1991, this Court's Memorandum Opinion filed on February 25, 1991, is amended as follows:

1. On page 1, second line from the bottom, the word "thick" is replaced by the word "wide".

2. On page 2, footnote 2, which reads:

> 2. Altnough the accident occurred in New Jersey, plaintiff is a resident of Pennsylvania and both defendants are incorporated in Pennsylvania, making this forum a proper venue for the action, under 28 U.S.C. § 1391(b).

is replaced with a new footnote 2, which reads:

> 2. Since the accident occurred in New Jersey, and neither defendant is incorporated in or has its principal place of business in Pennsylvania, this forum is not a proper venue for the action, which

is based upon federal law, despite plaintiff's residence here. See 28 U.S.C. § 1391(b). However, any objection based on improper venue has been waived under Fed.R.Civ.P. 12(h)(1).

BY THE COURT,

/S/ Robert S. Gawthrop, III
Robert S. Gawthrop, III, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1225

GARY PRINSKI,

Appellant

vs.

TERMAR NAVIGATION CO., INC., and
VAN OMMEREN SHIPPING B.V.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 89-06899)
District Judge: Honorable Robert S. Gawthrop, III

Submitted Under Third Circuit Rule 12(6)
August 5, 1991
Before: MANSMANN and ALITO, Circuit Judges,
and DIAMOND, District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

* Honorable Gustave Diamond of the United States District Court for the western District of Pennsylvania, sitting by designation.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/S/ Carol Los Mansmann
Circuit Judge

Attest

Sally Mrvos
Sally Mrvos, Clerk
AUG 12, 1991

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC. and VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

STIPULATION

The parties agree that if the within case were to be tried there would be evidence to support the following findings:

1. On January 15, 1988, Plaintiff, Gary Prinski, was employed as a longshoreman by Holt Cargo Systems, a stevedore with terminal facilities located in Gloucester, New Jersey. On that day Holt Cargo Systems had been hired to discharge a cargo of steel products from the M/V SERAFIN TOPIC, a cargo ship which, at the time, was owned by Defendant, Termar Navigation Co., Inc., and under time charter to Defendant, Van Ommeren Shipping B.V.

2. Plaintiff Prinski was a member of a longshore gang, of which James Phillips was the gang boss. The Phillips' gang was assigned to discharge the cargo that was in the No. 2 hold of the M/V SERAFIN TOPIC.

3. In December, 1987, the vessel had loaded steel products at Antwerp and Ijmuiden, two ports in the Netherlands, and sailed for Bridgeport, Connecticut, where it arrived and remained at an anchorage from January 7 through January 11, 1988. It then berthed and discharged cargo from all five holds on January

12 and 13, finishing shortly before midnight on the 13th. The vessel closed hatches and sailed immediately for Camden and arrived at berth there shortly before midnight on the 14th. On the morning of the 15th hatches were opened and five Holt gangs commenced discharging from all holds at 0800.

4. The vessel's cargo had been loaded and stowed overseas by independent contractor stevedores. The discharge at Bridgeport was conducted by an independent contractor stevedore and Holt, at Camden, acted in a similar capacity. Each of the Holt longshore gangs had its own foreman, or gang boss. There were also two head foreman or "ship bosses" and a stevedore supervisor assigned to the vessel by Holt.

5. Although the vessel encountered gale-force winds and heavy seas and was shipping solid water over its deck and hatches throughout most of the Atlantic crossing, air temperatures remained above freezing until January 6, 1988, the day before its Bridgeport arrival. Air temperatures then dipped below freezing throughout the time the vessel was at anchor at Bridgeport as well as during the coastwise trip to Camden on January 14. A record of air temperatures was not maintained aboard the vessel during periods that it was at berth, but Philadelphia area weather records show that the temperature remained below freezing on the 12th and during most of the 13th and well below freezing throughout the 14th and 15th. The severity of sea conditions during the Atlantic crossing had prevented vessel personnel from either entering or ventilating the cargo compartments.

6. At the time of the vessel's arrival at Camden the forward half of the No. 2 hold was stowed with hot rolled and palletized steel coils which were to be discharged at Camden.

7. The after half of the hold was stowed with structural steel (beams of various lengths and widths). The beams were to be discharged at Wilmington, North Carolina, the vessel's next port. On top of the beams there were two layers of black seamless steel tubing (pipe). The pipe consisted on random lengths with an outside diameter between 5" and 16.5", but most of the pipe was

of diameters ranging between 12" and 15". The pipe was stowed in a fore and aft direction with single and double pieces of approximately 1" thick dunnage boards placed between each tier. The stow of structurals topped by the pipe in the after half of the hold was somewhat higher than the stow of coils in the forward end.

8. When the vessel arrived at its previous port, Bridgeport, there had been a considerable amount of other cargo stowed above the pipe. Directly above the pipe there had been a stow of wide flange beams and sheet piling stacked between three and six tiers high in different areas. Above these there was a shipment of bundles of special sections four tiers high. On top of the foregoing, centered on the stow, there were, arranged in rows, 49 steel coils on wooden skids. Thus, the pipe which was deep within the after stow during the voyage, became exposed to view upon completion of the discharge at Bridgeport. The pipe was also to be discharged at Camden.

9. Holt, the stevedore at Camden, elected to discharge the coils in the forward end first and then, the pipe in the after end. The hold workers had a spelling arrangement according to which three men would work and three would be on standby elsewhere and these groups would relieve one another either every hour or every two hours. Plaintiff could not be certain which. He believed, however, that he had worked between 0800 and 1000 and again between 1300 and 1500.

10. Plaintiff and his fellow workers entered and left the No. 2 hold by means of a permanent ship's ladder located at the after end of the hold. The hold was approximately 90 feet square. In entering the hold the men would step off the hatch ladder onto the pipe and walk along the pipe to its forward end where they would climb down to the coil stow. In leaving they would retrace their steps to gain access to the ladder.

11. Plaintiff was injured shortly after 3:00 p.m. while in the course of leaving the hold. He was walking across the pipe to the ladder when he slipped and fell, sustaining the injuries for which

this suit has been brought. After falling, Plaintiff discovered that the cause of his fall was ice on a pipe. There appeared to be a discontinuous strip of ice affecting 10 or 11 of 12 adjacent pipes. The strip was approximately 1" wide and laid in a thwartship direction. Plaintiff testified that the strip of ice was thin. It could be seen if one was looking for it as he stood on the pipe, but was not readily apparent to him as he walked across the pipe. The ice, which appeared to cover only a narrow segment of the upper surface of the pipes as they laid in the stow, was photographed by the Plaintiff on the day following his accident. The strip can also be detected in one of many photographs taken by the cargo surveyor who was engaged to determine the possible existence of any damage to the cargo and, if so, its nature and origin. The surveyor had taken the particular photograph simply to show the arrangement of the pipe stow and had not noticed or mentioned in his report the presence of any ice on the pipe or anywhere else in any of the vessel's holds. He did note in other portions of his report that puddles of water were found in several holds which proved to be sea water; that some of the exposed products and their waste metal coverings showed superficial rusting from condensation; and that rust caused by the dripping of seawater from around the edges of hatch openings had in places caused lines of rust on products stowed uppermost and directly beneath these openings.

12. It is the opinion of an expert retained on behalf of Plaintiff, said opinion being derived from observing the photographs, and reviewing the vessel's stowage plan, the survey reports, and Plaintiff's deposition testimony, that the strip of ice came about as a result of water being squeezed from a piece of wet dunnage that had been on top of the pipe, which water then froze. The weight of the cargo which had been stowed on top of the pipe and which had been discharged in Bridgeport, would have been sufficient to squeeze water out of a piece of wood dunnage if the dunnage had been wet, which water might have frozen if the temperature was sufficiently low. This would explain the presence of the ice in a narrow strip running across a portion of the pipe stow. It assumes that although the entire stow with dunnage was in lace during a 14-day Atlantic crossing when tem-

peratures were above freezing, sufficient moisture remained in the piece of dunnage to be expelled from it and freeze thereafter during the sub-freezing weather which commenced during the night of January 6. This explanation, if correct, would support a finding that a strip of ice was present on the pipe at the start of the cargo operations in the No. 2 hold of the vessel on January 15, 1988. At any rate, since no other remotely plausible explanation has been found and Plaintiff has testified that the strip did consist of ice, the parties have agreed that it was ice and that it was present when the work began at 0800 on January 15, 1988.

13. There is no evidence that either of the Defendants had actual knowledge of a wet dunnage board having been used in the stow or of the existence of ice such as has been described by Plaintiff on the pipe in the stow aboard the vessel which was destined for Camden discharge.

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BY: _____
Charles Sovel
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BY: _____
T. J. Mahoney
Attorneys for Defendants

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

HOUSE REPORT NO. 92-1441

(as reported at 1972 U.S. Code Cong. and Adm. News beginning at page 4698)

* * *

[4701]

Elimination of Unseaworthiness Remedy

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to long-

[4702]

shoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional seamen's remedy based on the breach of the

vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were not being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony

[4703]

that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-

based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, *Crumedy v. The J. H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia*

[4704]

Societa v. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

[4705]

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in differ-

ent ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption to risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.

(2)

No. 91-772

FILED
JAN 30 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY PRINSKI,

Petitioner,

v.

TERMAR NAVIGATION CO. INC., and
VAN OMMEREN SHIPPING B.V.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN RESPONSE OF TERMAR NAVIGATION CO. INC., and VAN OMMEREN SHIPPING B.V.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

1. Whether the courts below were correct in holding a shipowner owes no duty to inspect or supervise cargo operations and cannot be held liable for injuries to longshoremen resulting from dangerous conditions that develop during the loading or unloading of cargo, as stated by this Court in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981).

STATEMENT OF OWNERSHIP

Termar Navigation Co., Inc., the shipowner, is not a publicly-owned corporation. Van Ommeran Shipping B.V., the time-charterer, is not a publicly-owned corporation. There are no publicly owned corporations, which are not parties to this appeal, that have a financial interest in the outcome.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED..... i

STATEMENT OF OWNERSHIP..... ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE..... 1

ARGUMENT..... 5

I. THE DISTRICT COURT AND COURT OF APPEALS DECISIONS WERE IN ACCORDANCE WITH BOTH THE APPLICABLE STATUTE AND THIS COURT'S HOLDINGS. 5

II. THE FACTS PRESENTED DO NOT JUSTIFY THE GRANTING OF THE WRIT OF CERTIORARI, AS THE DECISION REACHED BY THE THIRD CIRCUIT WOULD NOT HAVE HAD A DIFFERENT OUTCOME UNDER THE STANDARDS SET FORTH BY EITHER THE FIFTH OR NINTH CIRCUIT COURTS OF APPEAL 9

A. The facts of the case before the Court do not present a conflict when analyzed under the test set forth by the Fifth Circuit Court of Appeals..... 9

B. The facts of the case before the Court do not present a conflict when analyzed under the test set forth by the Ninth Circuit Court of Appeals..... 11

CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases: Page

Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) 7

Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969)..... 7, 8

Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984)..... 10

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) 5, 6, 7, 8, 9

Turner v. Japan Lines, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) .. 11, 12, 13

Woods v. Sammisa Co., Ltd., 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990) .. 9, 10, 13, 14

Statutes:

29 C.F.R. § 1918.1..... 5

29 C.F.R. § 1918.91 (c) 5

33 U.S.C. § 905(b)..... 4, 5

Other Authorities:

H.R. Rep. No. *92-1441, reprinted in* 3 U.S. Code Cong. and Adm. News 4698, 4702 (1972) 5

No. 91-772

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY PRINSKI,

Petitioner,

v.

TERMAR NAVIGATION CO. INC., and
VAN OMMEREN SHIPPING B.V.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN RESPONSE OF TERMAR NAVIGATION CO. INC., and VAN OMMEREN SHIPPING B.V.

COUNTERSTATEMENT OF THE CASE

The entire record before the United States District Court for the Eastern District of Pennsylvania consisted of Responents'[1] Motion for Summary Judgment on

1. Respondents are Termar Navigation, Co., Inc., the shipowner, and Van Ommeren Shipping, B.V., the time charterer of the vessel. For purposes of this case, there was no distinction raised by the parties below as to the difference in duties or obligations as between the time charterer and the owner; both will be included by use of the term "shipowner".

Stipulated Facts and Petitioner's Response to that motion. The same motion and response constituted the entire record before the Third Circuit Court of Appeals.

Petitioner was a member of one of five gangs of longshoremen provided by Holt Cargo Systems, Inc. (hereinafter "Holt")[2] which were responsible for discharging cargo from the five holds of the M/V SERAFIN TOPIC at Camden, New Jersey, on January 15, 1988. (Appendix at 12a). The SERAFIN TOPIC, upon the conclusion of the discharge of cargo shortly before midnight on January 13, 1988 at Bridgeport, Connecticut, closed its hatches and immediately sailed for Camden.[3] Upon arrival in Camden, the five Holt gangs were assigned to discharge the Camden-bound cargo. (Appendix at 12a).

Petitioner was assigned to discharge cargo from the No. 2 hold. Holt, the independent stevedore, elected to discharge the steel coils at the forward end of the hold first and then discharge the pipe in the aft end. (Appendix at 13a.) The pipe was of random lengths, with an outside diameter between 5" and 16.5". Most of the pipe ranged between 12-15" in diameter. The pipe was stowed in a fore and aft direction. (Appendix at 12a.)

The Holt workers had a spelling arrangement, i.e. three men would work and three would be on standby elsewhere. These groups would relieve one another either every hour or two hours. Petitioner worked between 8 a.m. and 10 a.m. and again between 1 p.m. and 3 p.m. (Appendix at 13a.)

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2. Holt is an independent contractor providing stevedore services, as were the stevedores which loaded the cargo on the vessel at the two ports in the Netherlands. Further, each of the Holt gangs had two head foremen, or "ship bosses" and a stevedore supervisor assigned to the vessel by Holt. (Appendix at 12a).

3. When the Bridgeport cargo in the No. 2 hold was discharged, the pipe involved in this action became visible. (Appendix at 13a.) The pipe was not visible when the vessel left the Netherlands for the United States.

Petitioner spent roughly four hours working in the hold prior to his injury on the ice. He attempts to create an inference that the area of ice was larger or more prominent than it actually was. The parties stipulated that:

> In entering the hold the men would step off the hatch ladder onto the pipe and walk **along** the pipe to its forward end where they would climb down to the coil stow. [Emphasis added.] (Appendix at 13a, Paragraph 10).

Petitioner only walked *across* the pipe as he was leaving the hold shortly after 3 p.m., when he was injured. (Appendix at 13a, Paragraph 11). Petitioner attempts to make this distinction, as it is important to his contention that the cargo which was not being actively discharged was work space. But, the work space contention was not a part of the stipulated facts. The issue of whether the cargo was work space was not addressed by either the United States District Court for the Eastern District of Pennsylvania[4] or by the Third Circuit Court of Appeals.

Petitioner makes the self-serving observation, at page 5 of the Petition, that the pipe in the aft end of the hold became a walking surface for the stevedores during the discharge of cargo. This begs the question that Petitioner is seeking to put before this Court.

The strip of ice was not seen by the Petitioner until after his fall. The strip of ice was not a continuous strip extending over the pipe, but rather "a discontinuous strip of ice affecting 10 or 11 of 12 adjacent pipes. The strip was approximately 1" wide and laid in a thwartship direction." (Appendix at 14a.)

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4. The Honorable Robert S. Gawthrop III, held that cargo was not work space within the parameters established in *Scindia*.

Fortuitously, the strip was visible in photographs taken by a cargo surveyor,[5] who had entered the hold prior to the Holt gangs' starting the discharge of cargo. The surveyor did not notice the ice and had only taken the photograph to show the arrangement of the cargo in the hold. The surveyor's report noted no icy conditions aboard the ship and, in fact, reported puddles of water which appeared to be sea water in several other holds. (Appendix at 14a.)

The parties stipulated that there was no evidence that Respondents had actual knowledge of the existence of the ice on the pipe in the stow. (Appendix at 15a.) Therefore, it was not an open and obvious hazard.

The parties agreed[6] that the only plausible explanation for the presence of the ice was that during the course of the trans-Atlantic crossing the weight of the Bridgeport cargo had squeezed water out of the dunnage used by the foreign stevedores. (Appendix at 14-15a.)[7] The parties agreed that there is no evidence that the shipowner knew wet dunnage had been used by the foreign stevedores if, in fact, it had been used.

Petitioner filed his action under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). On Respondent's Motion for Summary Judgment based on the stipulated facts alone, the United States District Court for the Eastern District of Pennsylvania entered summary judgment, and this was affirmed by the Third Circuit Court of Appeals.

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5. While the cargo surveyor was retained by Van Ommeren, he was independent in the sense that his purpose was to inspect the cargo for damage and not to evaluate the conditions of the holds for the purposes of the safety of the off-loading stevedores.

6. For the purposes of the summary judgment motion, the parties agreed to the explanation given by Petitioner's expert, but no formal proof was offered.

7. It should be noted that there is no mention in the stipulation of the dunnage being the type of wood that would retain a "considerable" amount of moisture, as Petitioner contends at page 6. *Id.*

ARGUMENT

I. THE DISTRICT COURT AND COURT OF APPEALS DECISIONS WERE IN ACCORDANCE WITH BOTH THE APPLICABLE STATUTE AND THIS COURT'S HOLDINGS.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b)[8], provides the exclusive remedy for Petitioner Prinski by allowing a direct action for negligence against the vessel's owner for injuries.[9] The Act does not provide for liability without fault.[10]

The leading case decided by this Court in the area of the duty of the shipowner to the longshoreman is *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981). This Court therein held:

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8. The Act provides that the employers of longshoremen may have such regulations imposed upon them as the Secretary of Labor deems necessary. Among those regulations, at 29 C.F.R. § 1918.1, *et seq.* are those governing housekeeping. 29 C.F.R. § 1918.91(c) states that "Slippery conditions shall be eliminated as they occur." Therefore, Holt had the responsibility to eliminate the ice upon the discovery of it in the cargo area upon the commencement of or during cargo operations.

9. The 1972 amendments to the act specifically exclude any remedy based on the unseaworthiness of the vessel.

10. 10 H.R. Rep. No. *92-1441, reprinted in* 3 U.S. Code Cong. and Adm. News 4698, 4702 (1972). The Congress further stated that:

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or a cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

H.R. Rep. No. *92-1441, reprinted in* 3 U.S. Code Cong. and Adm. News 4698, 4703 (1972).

A vessel would no longer be liable for the acts or omissions of stevedores, for the manner in which stevedores perform their work or for the gear or equipment of stevedores. *Id.*

> We are of the view that absent contract provision, positive law, or custom to the contrary – none of which has been cited to us in this case – the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations.

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 172.

It is clear that the stipulated facts before the courts below revealed no contract provision which imposed any duty, nor any positive law or custom which did so. Under *Scindia,* the shipowner owed no duty to Mr. Prinski once cargo operations had begun.

The parties agree that Respondents had no actual or constructive knowledge of the ice. The parties agree that it was Holt, the stevedore, who made the determination as to how to unload the cargo and who elected to discharge the coiled steel in the forward part of the hold first.

Unlike *Scindia,* which involved ship's equipment, this matter involves ice on cargo which did not exist at the time the vessel was loaded in the Netherlands, nor did it exist at the vessel's first docking in Bridgeport. Rather, it is a condition which developed in the cargo between Bridgeport and Camden, of which the shipowner was not aware.

Under *Scindia*, the shipowner is entitled to rely on the stevedore to inspect and supervise the cargo operations once the ship is surrendered to the stevedore. At the time of the incident, there had been a full day of uneventful discharge under the direction of Holt's stevedore foremen. Petitioner and his fellow gang members had been in the hold where the ice was found for at least four hours during the course of the day before he was injured. It was only at the end of his shift that he "found" the ice.

This Court clearly has stated it would be inconsistent with the Longshore and Harbor Workers' Compensation Act to hold that a shipowner has a continuing duty to "take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process." *Scindia*, 451 U.S. at 169.

The stipulated facts indicate that the ice formed at some point between the loading of the ship in the Netherlands and the unloading of the Camden-bound cargo. For this Court to grant certiorari under these facts would make no sense, as the facts as presented under the stipulation create a situation which is completely consistent with the *Scindia* holding.[11]

Further, ice in the cargo area is unusual. Petitioner admits this at page 6 of his Petition. This is not the type of factual situation which warrants review by this Court. It is a factual pattern which is not likely to recur, making this case inappropriate for review by this Court, as the final determination would have an impact only on the parties herein.

The *Scindia* court reiterated the holding of *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404 (1969):

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11. The district court also relied on *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) in reaching its conclusion that there was no duty on the part of the shipowner to inspect the cargo handling operations. The *Derr* court specifically relied upon language in *Scindia* in reaching this determination. *See, Scindia,* 451 U.S. at 178.

> the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should have been known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia, 451 U.S. at 166-67, *quoting Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. at 417, n.18.

That duty extends to those items which the vessel knows or in the exercise of reasonable care should know would be likely to be encountered by the stevedore during cargo operations. The stipulated facts make it clear that it was not likely that Petitioner would encounter ice in the cargo hold, therefore, no duty existed regarding the ice.

In analyzing the facts of this case under the Court's holding in *Scindia*, the District Court's holding and subsequent affirmance by the Court of Appeals, were correct.

II. THE FACTS PRESENTED DO NOT JUSTIFY THE GRANTING OF THE WRIT OF CERTIORARI, AS THE DECISION REACHED BY THE THIRD CIRCUIT WOULD NOT HAVE HAD A DIFFERENT OUTCOME UNDER THE STANDARDS SET FORTH BY EITHER THE FIFTH OR NINTH CIRCUIT COURTS OF APPEAL.

Both Petitioner and Respondents agree that there is a conflict among the Third, Fifth and Ninth Circuits as to the extent to which *Scindia* is to be applied. But, had either the Fifth Circuit or Ninth Circuit's tests been applied to the facts before the Court, the outcome would have been no different.

A. The facts of the case before the Court do not present a conflict when analyzed under the test set forth by the Fifth Circuit Court of Appeals.

The Fifth Circuit has held that it is the duty of the shipowner to correct, "all dangerous conditions including those relating to cargo, equipment-related and other defects of which **it has actual knowledge** and which it actually knows the stevedore does not intend to correct." *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 848-49 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990) [Emphasis added].

The *Woods* case arose from facts surrounding a dangerous stow of pipe which injured the plaintiff. There was evidence presented that the defendant shipowners knew of the dangerous stow before the vessel had left its originating port.[12]

Unlike the *Woods* case, the parties in the case at bar have stipulated that there was no evidence that the

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12. No evidence was presented, nor was it raised below, that the cargo which Petitioner Prinski worked on was stowed in a dangerous manner. This issue has been waived by the parties and Respondents submit it is not part of the record presented for consideration by this Court.

Respondents had knowledge of the use of wet dunnage, which may have caused the ice, or of the existence of the ice itself.

Analyzing these facts through the holding in *Woods*, the Fifth Circuit would have to agree that there was no actual knowledge by the shipowner or knowledge that the stevedore would not correct the dangerous defect.

Further, in *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), which was relied upon by the *Woods* court, the same circuit held that "if an independent contractor performs the loading operations, and the shipowner reasonably has no knowledge of a dangerous condition thereby created, the owner may escape liability." 730 F.2d at 299 n.2. The facts stipulated to by the parties indicate that there was no knowledge on the part of the shipowner that the independent stevedore contractors who loaded the SERAFIN TOPIC prior to its departure from the Netherlands might have used wet dunnage during the loading process in hold No. 2.

The outcome of the case before this Court would not have been altered by the application of the *Harris* or *Woods* decisions of the Fifth Circuit. The stipulated facts before this Court do not result in a conflict in the application of the law to the facts, as between the Third Circuit and the Fifth Circuit. The Fifth Circuit summarized the three duties of the shipowner under *Scindia* as: 1) duty to warn if the shipowner has knowledge under the circumstances; 2) duty to warn of hidden dangers; and 3) duty to warn if the shipowner has actual knowledge. Under the three duties as discussed in this line of Fifth Circuit cases, it is clear that:

> 1) Under the first duty, the shipowners herein did not know or could not reasonably have known that there was ice in hold No. 2, as this was an unusual condition, and the shipowner had no reason to know or believe that wet dunnage had been used by the

foreign independent stevedore contractors which loaded the cargo prior to departing from the Netherlands;

2) Under the second "hidden danger" duty, no duty has been breached. Petitioner must show that the ice he encountered was a danger which was or in the exercise of reasonable care should have been known to the vessel. Further, Petitioner must show that it would be likely that he would encounter the danger of the ice in cargo operations. The Petitioner also must show that the danger would not be open and obvious to him or anticipated by him if reasonably competent in the performance of his work. This duty was not breached, and cannot now be raised, as it was not raised below. This has been waived by the Petitioner;

3) Under the third duty, actual knowledge is required. The stipulation of fact states that the owner had no actual knowledge of the condition, therefore no duty has been breached.

While under the proper factual circumstances, the cases of the Third and Fifth Circuits may be in conflict, there is no conflict presented on the facts before the Court. Here, the unique factual situation avoids any conflict, as the case would have had the same outcome in either the Fifth or Third Circuit.

B. The facts of the case before the Court do not present a conflict when analyzed under the test set forth by the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals has addressed the issue of a vessel owner's duty with regard to longshoremen in cargo spaces of the vessel in *Turner v. Japan Lines*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). In *Turner*, the plaintiff was injured when cargo which was not properly shored collapsed beneath him. The plaintiff produced evidence

that the cargo was improperly shored, and that the vessel owner knew or should have known, based on the amount of time marine carpenters were aboard during the loading of the ship in Japan, that the shoring was improper.[13] The court held that "the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." *Turner*, 651 F.2d at 1304 (9th Cir. 1981). The court stated that the vessel could ensure safety by choosing a reliable foreign stevedore, supervising the foreign stevedore's work if necessary and warning the off-loading stevedore of any dangerous conditions created by the foreign stevedore. Part of the court's reasoning was that the Longshore Act, while prohibiting a vessel owner from seeking reimbursement from American stevedores, did not prohibit a vessel owner from recovering against the foreign stevedore. The *Turner* court was concerned with leaving the plaintiff without a remedy, in the event the foreign stevedore was a party against which he had no rights or would not be amenable to suit in a U.S. court.

In *Turner*, it was undisputed that the negligence at issue was that of the foreign stevedore who loaded the ship in Japan. It is clear that the shipowner only had constructive knowledge of the inadequate shoring in light of the little time which the marine carpenters spent aboard building the shoring.

The facts in the case before this Court now are vastly different. There was no finding of negligence on the part of the foreign stevedore in the District Court. The question was not raised. In fact, the District Court's opinion specifically states that the negligence of the on-loading stevedore would be a jury question and the

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13. There was no evidence, nor was it raised by the parties below, that the cargo was improperly stowed in hold No. 2. Therefore, this issue has been waived and is not properly before the Court for consideration.

decision of the District Court was based on the assumption that there was no negligence on the part of the foreign stevedore. (Appendix at 3a, fn.3). The stipulated facts did not reach the question of whether the foreign stevedore was negligent, nor was any evidence so produced by the plaintiff, other than the opinion of his expert which was based upon many assumptions.

Absent a showing of negligence by the foreign stevedore, the facts before the court would have had the same outcome if decided by the *Turner* court.

There is no conflict among the circuits under this set of facts. While the holdings of the cases in the Third, Fifth and Ninth Circuits can lead to conflicts, Respondents submit that the outcome does not change given the unique factual situation before this Court.

CONCLUSION

Where there is an obvious conflict among the circuits, this Court has an obligation to resolve the conflict in cases concerning important matters of Federal law. However, that resolution should be reserved for factual situations which will truly clear the conflict and not create further confusion. While the cases in the Court of Appeals discussed appear to conflict, this is not the case in which to resolve that potential conflict.

First, under any of the three standards set by the Third, Fifth or Ninth Circuits, the outcome of this case would not change.

Second, the facts of this case are unlikely to occur again. The parties agree that ice in a cargo hold is an unusual condition. Hearing this appeal would be wasteful of this Court's time when in all likelihood there is a broader, more traditional fact pattern which will present itself to this Court in the future.

Third, this Court, as recently as January 1990, refused to hear this issue when certiorari was denied in the *Woods* case. *Woods* presented three potential questions for review – first, a question regarding the conflict

in the Circuits as to open and obvious conditions; second, a question as to indemnity under a standard time charter agreement; and third, a question regarding the apportionment of damages as between the time charterer and the vessel owner. In *Woods* this Court did not see fit to review those issues which have a far greater impact on the law of admiralty. Respondents contend that this matter is less worthy of merit, as the issue presented to the Court now is narrow and unlikely to recur.

The specific facts of this case do not raise questions of compelling importance to the general maritime law, and there is no further reason to review the decision by the District Court and its affirmance by the Third Circuit.

Respectfully submitted,

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91 - 772

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY PRINSKI,
Petitioner,

v.

TERMAR NAVIGATION CO., INC. and
VAN OMMERER SHIPPING B.V.,
Respondents.

Petiton for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Derr v. Kawasaki Kisen K.K.,
835 F.2d 490 (3d Cir. 1987),
cert. denied, 496 U.S.1007 (1988) 1, 2, 6

Harris v. Flota Mercante Grancolombiana, S.A.,
730 F.2d 296 (5th Cir. 1984) 1, 6

Hernandez v. M/V Rajaan,
841 F.2d 582 (5th Cir. 1988) 6

Scindia Steam Navigation Co., Ltd.,
451 U.S. 156 (1981) 4

Subingsubing v. Reardon Smith Line, Ltd.,
682 F.2d 779 (9th Cir. 1982). 6

Turner v. Japan Lines, Ltd.,
651 F.2d 1300 (9th Cir. 1981),
cert. denied, 459 U.S. 967 (1982) 1, 6

Woods v. Sammisa Co., Ltd., et al.,
873 F.2d 842 (5th Cir. 1989),
cert. denied, 493 U.S. 1050 (1990) 1, 6

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REPLY TO BRIEF IN OPPOSITION

Respondents, in their Brief in Opposition, concede -- as they must -- the ongoing conflict in circuits arising from the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. (1987), *cert. denied*, 496 U.S.1007 (1988), and the decisions from the Fifth and Ninth Circuits.[1] Their arguments that the instant case is not an appropriate case in which to resolve that conflict are wrong, both factually and legally.

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1. See *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

1. Respondents' assertion, at page 3 of the Brief in Opposition, that the issue of "whether the cargo was work space" was not addressed by either the District Court or the Third Circuit in this case is a patent misstatement. The issue clearly was raised in the District Court, considered in the District Court's decision, and resolved against Petitioner by the District Court's citing of the Third Circuit's decision in *Derr*. Thus, the following excerpt from the District Court opinion:

> Plaintiff argues that the ice on the black steel piping in the #2 hold of the M/V Serafin Topic was a dangerous condition in the ship's **work space**, of which the defendants should have known and for which they may be held liable. However, the Third Circuit in Derr held that the Supreme Court's reference to "**work space**" was not intended to include stowed cargo. See Derr, 835 F.2d at 495. (5a) (Emphasis in bold supplied)

Quite clearly, the issue of whether stowed cargo is part of the "work space" of a vessel goes to the very heart of the instant case. That it was not a stipulated fact in the District Court, see Brief in Opposition at page 3, hardly can be considered surprising for it was the very issue that was presented to the court for resolution. As set forth in the excerpt quoted above, it is an issue that was addressed by the District Court. Furthermore, it is an issue that necessarily was considered by the Third Circuit in affirming the District Court's decision, and, in any event, it most assuredly is an issue that was addressed by the Third Circuit in the *Derr* decision itself, see 855 F.2d at 495-6. It thus is an issue clearly raised in the case, amply supported by the record and urgently in need of review by this Court.

2. At page 6 of the Brief in Opposition, Respondents erroneously assert that the parties "agree" that Respondents had no "constructive" knowledge of the ice. This is not correct and is a gross misstatement of Petitioner's position in this case.

It always has been Petitioner's position, from the inception of the case, that the presence of the ice was a condition which was capable of being discovered by reasonable inspection, and, therefore, was a condition of which Respondents should be deemed to have "constructive" knowledge. The District Court recognized this when it stated Petitioner's position as follows:

> The plaintiff argues that the defendants are liable for his injuries because they failed to inspect the cargo hold before Holt began offloading the cargo in Camden. **Plaintiff contends that had defendants properly inspected the cargo, they would have discovered the ice and the danger it presented, and they would have been required to remedy or warn about the condition.** Defendants counter they had no duty to inspect. (2a) (Emphasis in bold supplied)
>
> . . . .
>
> Plaintiff argues that the ice on the black steel piping in the #2 hold of the M/V Serafin Topic was a dangerous condition in the ship's work space, **of which the defendants should have known** and for which they may be held liable. (5a) (Emphasis in bold supplied)

Contrary to the impression created by the Brief in Opposition, the Stipulation which formed the basis for the District Court's decision in the instant case was not a limitation on what facts could be found nor was it a waiver of anything.[2] It was, as is clearly stated in its introductory paragraph, a stipulation that, "if the case were to be tried there would be evidence to support" the findings set forth in

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2. The assertion at page 11 of the Brief in Opposition that Petitioner "waived" what Respondents refer to as the "hidden danger" duty is simply not true. Petitioner did not "waive" any theory of recovery and there is no basis in the record for, nor is there any truth to, Respondents' assertion of a "waiver.".

the Stipulation (11a). The purpose of the Stipulation was to create a record for purposes of a Motion for Summary Judgment in lieu of using depositions and affidavits, but Petitioner, in entering into the Stipulation, did not waive the basic principle governing motions for summary judgment that the Court must view the factual record, and all the inferences reasonably to be drawn therefrom, in the light most favorable to the party, in this case the Petitioner, opposing the motion.[3]

The factual Stipulation in this case would support a jury finding (1) that the ice existed on the pipe *prior* to the start of cargo operations at Holt (15a), and (2) that it was condition that was capable of being discovered by a reasonable inspection (14a). While there was no evidence that Respondents had actual knowledge of the presence of the ice, the absence of actual knowledge would not preclude a jury finding of constructive knowledge if, under the law, a duty of inspection existed. This Court, in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 68 L.Ed.2d 1 (1981), specifically recognized that, as to conditions existing *prior* to the start of cargo operations, there was a duty of inspection which would support a finding of constructive knowledge. This principle is recognized in at least four places in the *Scindia* decision.[4]

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3. The attorney who represented Respondents in the District Court and who participated in the preparation of the Stipulation and signed it on behalf of Respondents retired prior to the taking of the appeal in this case. Counsel who prepared the Brief in Opposition filed in this Court did not handle the case at the District Court level and may not have been aware of the limited scope of the Stipulation as stated in the introductory paragraph of the Stipulation.

4. The following excerpts from the *Scindia* decision establish the principle that the vessel is charged with "constructive knowledge" of conditions existing at the commencement of cargo operations:

> ... This is true, *Scindia* argues, even though the hazard is an obviously defective ship's winch being used by the stevedore and his longshoremen

The single issue presented by this case is whether the vessel's duty of inspection *prior* to the start of cargo operations extends to the condition of the vessel's cargo stow. This is the issue on which there is a clear conflict in circuits and it is an issue which is clearly presented by the record in this case.

3. Contrary to Respondents' assertions at pages 9 through 13 of the Brief in Opposition, the instant case would have been decided differently under the law prevailing in both the Fifth and Ninth Circuits. In an effort to distinguish the instant case from the admittedly conflicting decisions of the Fifth and Ninth Circuits, Respondents argue that the Fifth and Ninth Circuit cases involved factual situa-

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...Continued...

> employees, and even if the winch was defective when the stevedore came aboard and *the vessel is charged with knowledge of the condition*. See 451 U.S. at 167-168, 68 L.Ed.2d at 13. (Emphasis supplied)
>
> . . . The malfunction being obvious and Seattle having continued to use it, Scindia submits that if it was aware of the condition *or was charged with knowledge of it*, it was nevertheless entitled to assume . . . . See 451 U.S. at 175, 68 L.Ed.2d at 17. (Emphasis supplied)
>
> Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. *The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition*. See 451 U.S. at 176, 68 L.Ed.2d at 17-18. (Emphasis supplied)
>
> . . . But as we understand the opinion below, the Court of Appeals held that there was a triable issue as to whether the shipowner had actual knowledge of the failure of the winch's breaking mechanism *or was chargeable with knowledge because the winch was defective from the outset*. See 451 U.S. at 178, 68 L.Ed.2d at 19. (Emphasis supplied)

tions in which there was evidence that the vessel had actual knowledge of the unsafe condition of the cargo stow, *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), and *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), or the hazardous condition was created by the negligence of a foreign stevedore, *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). However, in advancing these distinctions, Respondents simply have ignored the doctrine of constructive knowledge, a doctrine which has been applied by both the Fifth and Ninth Circuits in appropriate cases, see *Hernandez v. M/V Rajaan*, 841 F.2d 582, 586 (5th Cir. 1988), *Subingsubing v. Reardon Smith Line, Ltd.*, 682 F.2d 779, 781 (9th Cir. 1982). There is no reason to believe that these Circuits would not similarly apply the doctrine of constructive knowledge to a hazardous condition existing in a cargo stow in an appropriate case. The difference between the law in the Third Circuit, as set forth in *Derr*, and the law in the Fifth and Ninth Circuits, is that the Third Circuit has held that the vessel's duty of inspection (upon which constructive knowledge is predicated) does not extend to the condition of a cargo stow whereas the other Circuits have held that it does. In any Circuit in which the vessel's duty of inspection extends to the condition of a cargo stow the instant case, by definition, would be decided differently.

4. Respondents' argument that a Writ of Certiorari should be denied because a hazard created by the presence of ice in a cargo hold is unlikely to recur also is without merit. It is predicated on a far too narrow perception of the factual issue presented by the decision below. The factual issue presented by the instant case is the vessel's responsibility to inspect for an unsafe condition developing in a cargo stow during an ocean voyage *subsequent* to the cargo being loaded and *prior* to the start of discharging operations, in which the responsibility for creating the condition can not be attributed to any negligence on the part of the loading stevedore. Rather than being an unusual event, this is a factual picture which may frequently occur. Putting

aside the possible formation of ice, which is unusual, the possible shifting of cargo, even though properly stowed and secured, creating dangers for the discharging longshoremen is a factual situation which occurs all too frequently, as is the possibility of leakage of cargo from the containers in which they are packed and stored in the hold, creating slippery or other types of dangers for discharging longshoremen. That the instant case happened to involved a slipping on ice, rather than on grease or oil, or cashew nut oil, or cocoa butter, or some esoteric liquid chemical that a ship may be carrying, should not be allowed to obscure the true nature of the problem involved -- namely, does the vessel's duty of inspection extend to the condition of a cargo stow. That issue, on which there is an unquestioned conflict in circuits, is raised as clearly on the record in this case as it would be in any of the other multitude of situations in which it might arise.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that a Writ of Certiorari should issue to review the Opinion and Judgment of the court below.

Respectfully submitted,

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